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No. 80-1481

In the Supreme Court of the United States

OCTOBER TERM, 1980

BREAD POLITICAL ACTION COMMITTEE, ET AL.,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, ET AL., APPELLEES.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

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OCTOBER 30, 1981

QUESTIONS PRESENTED

(1) Whether appellants, who are not among the categories enumerated by Congress as eligible plaintiffs in 2 U.S.C. § 437h, may nonetheless invoke the jurisdiction of this Court pursuant to that provision.

(2) Whether this Court should affirm the *en banc* decision of the court of appeals that 2 U.S.C. § 441b (b)(4)(D) is consistent with the first and fifth amendments to the Constitution of the United States.*

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* The other parties to this proceeding include: National Lumber and Building Material Dealers Association ("NLBMDA"), Lumber Dealers Political Action Committee ("LuDPAC"), National Restaurant Association ("NRA") and Restauranteurs Political Action Committee ("RPAC") as appellants. Named as other appellees are: Francis R. Valeo, Secretary of the United States Senate and Ex-Officio member of the Federal Election Commission, Edward Henshaw, Clerk of the U.S. House of Representatives and Ex-Officio member of the Commission and Vernon W. Thomson, Thomas E. Harris, Neil Staebler, William Springer, Robert O. Tiernan and Joan D. Aikens, as members of the Commission, and Hon. Griffin Bell, as Attorney General. By court order dated June 10, 1977, the Attorney General was dismissed as a defendant. Messrs. Staebler and Springer are no longer Commission members; Messrs. John W. McGarry and Frank P. Reiche are currently members of the Commission. William F. Hildenbrand is currently the Secretary of the Senate and Ex-Officio member of the Commission, rather than Francis R. Valeo.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

OPINIONS BELOW

The January 12, 1979, opinion of a panel of the United States Court of Appeals for the Seventh Circuit, overruling the district court's decision not to certify under § 437h and remanding the case for fact-finding and certification, is published at 591 F.2d 29 (7th Cir. 1979). The December 19, 1979, Order of the United States District Court for the Northern District of Illinois certifying constitutional questions to the court of appeals is not published. The December 5, 1980, decision of the United States Court of Appeals for the Seventh Circuit is reported at 635

F.2d 621 (7th Cir. 1980) (en banc) and appears at Appendix A of appellants' Jurisdictional Statement ("J.S. App.") at 1-45.

JURISDICTION

Appellants rely upon 2 U.S.C. § 437h as the basis for this Court's jurisdiction.

STATUTES INVOLVED

This case concerns several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*[1] Specifically, 2 U.S.C. § 437h is at issue with regard to the jurisdiction of this Court, and appellants challenge 2 U.S.C. § 441b(b)(4)(D) on constitutional grounds. Sections 437h and 441b are set forth in the Appendix to the Commission's Motion to Dismiss or in the Alternative to Affirm, filed April 1, 1981.

STATEMENT OF THE CASE

A. Historical Development of Section 441b

This case challenges the constitutionality of an exception to the § 441b prohibition on the use of corporate and labor organization funds in connection with federal elections. Concern over aggregations of corporate wealth being used to influence federal

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[1] The Federal Election Campaign Act of 1971 (the "Act" or "FECA"), Pub. L. No. 92-255, 86 Stat. 3 (1972) was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976), by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977), and by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

elections led to congressional passage in 1907 of the first concrete congressional effort to regulate the impact of such aggregated wealth, the Tillman Act, Chapter 420, 34 Stat. 864 (1907), which was directed only at corporations and prohibited them from making "money contributions" in connection with federal elections. This reflected the congressional judgment that the only way to prevent corruption and abuse arising out of corporations using their aggregated wealth to influence elections was to prohibit completely corporate contributions in connection with federal elections.

In the ensuing years, Congress concluded that the reach of the statute was insufficient to prevent these evils from undermining faith in the electoral process. Thus, in 1925, the Tillman Act was expanded to include all contributions and was incorporated into the Federal Corrupt Practices Act, 43 Stat. 1070. The prohibitions were extended to labor organizations, first temporarily by the War Labor Disputes Act, 57 Stat. 163, in 1943, and then permanently by the Labor Management Relations Act (Taft-Hartley) of 1947, 61 Stat. 159, which also broadened the prohibition to include expenditures as well as contributions. In 1948, the prohibition was re-enacted, without substantive change, as 18 U.S.C. § 610.[2]

The next substantial changes to the statutory provisions came in 1971 when Congress enacted a number of explicit exceptions to the broadly phrased

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[2] The evolution of the predecessor of § 441b, 18 U.S.C. § 610, through the 1971 legislation, is fully set forth in *Pipefitters* v. *United States*, 407 U.S. 385 (1972) (*"Pipefitters"*); *United States* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 571 (1957) (*"U.S.* v. *UAW"*), and *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 112-113 (1948) (*"U.S.* v. *CIO"*).

prohibitions, to explicate the areas in which the expenditure of money in connection with federal elections by corporations was protected.[3] Described by their sponsor as "mere codifications," the 1971 amendments were "intended to strike a balance between the objectives served by banning the use of corporate and union funds in federal elections and permitting wholly unrestricted association between the regulated groups and those individuals in a direct relationship with them". J.S. App. at 11, *citing* 117 Cong. Rec. 43,379-381 (1971). They were drafted and adopted as three express exceptions to the overall prohibition, which allowed corporations and labor organizations to use general treasury funds for the following purposes: to communicate with their stockholders or members and their families on any subject, § 441b (b) (2) (A); to engage in non-partisan registration and get-out-the-vote activities aimed at their stockholders or members and their families, § 441b(b) (2) (B); and to establish, administer, and solicit voluntary contributions to a separate segregated fund for political purposes, § 441b(b) (2) (C).[4]

Following this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*"Buckley"*), Congress reexamined this entire area. It reenacted the broad prohibition on corporate and union expenditures in connection with federal elections, but made it part of FECA, Title 2 of the U.S. Code, rather than the criminal code, Title 18. In addition, Congress explicitly identified those groups of individuals who could be solicited for con-

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[3] *See* 117 Cong. Rec. 43,379-81 (1971) (remarks of Mr. Hansen); 117 Cong. Rec. 43,383-85 (1971) (remarks of Mr. Thompson).

[4] These changes were enacted while this Court was considering *Pipefitters, supra.*

tributions to a separate segregated fund with corporate money. In section 441b(b)(2)(C), Congress added a corporation's own executive and administrative personnel and their families to the list of permissible solicitees. *See* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 7 (1976). Congress also provided, in § 441b (b)(4)(B), that under certain circumstances a corporation could solicit contributions twice yearly from any of its employees, and a labor organization representing corporate employees could solicit twice yearly from corporate stockholders, executive or administrative employees and their families.

Recognizing that some types of corporations are organizations which have members rather than stockholders, Congress also enacted § 441b(b)(4)(C) in 1976, which permitted "a membership organization, cooperative, or corporation without capital stock" to use corporate funds to solicit contributions to its separate segregated fund from its members.[5] And, recognizing the unique situation of trade associations, Congress in § 441b(b)(4)(D), the provision at issue in this case, added an additional category of individuals which an incorporated trade association could use its corporate money to solicit for contributions to its separate segregated fund, which it defined as:

> the stockholders and executive or administrative personnel of the member corporations of such trade associations and the families of such stockholders or personnel to the extent that such

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[5] *See* 122 Cong. Rec. S3811, S3812 (daily ed. March 18, 1976) (remarks of Sen. Allen), *Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Legis. Hist.*") at 463, 464; 122 Cong. Rec. S6477-78 (daily ed. May 4, 1976), *1976 Legis. Hist.* at 1107-08. *See also* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6-7 (1976), *1976 Legis. Hist.* at 806-807.

solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

B. Procedural History

On March 22, 1977, appellants filed a complaint in the United States District Court for the Northern District of Illinois seeking a permanent injunction against enforcement of 2 U.S.C. § 441b(b)(4)(D) or, alternatively, certification of the constitutionality of the subsection to the court of appeals under 2 U.S.C. § 437h. Joint Appendix ("J.A.") at 15. The district court denied the request for an injunction on the ground that the appellants had not demonstrated a probability of success on the merits and denied the motion for certification because the named plaintiffs were not among those enumerated as eligible to invoke the extraordinary procedures of 2 U.S.C. § 437h. Appellants' request for an interlocutory appeal on the question of whether FECA's unique jurisdictional provision is available for use by any person, regardless of Congress's limited enumeration, was granted by the court of appeals under 28 U.S.C. § 1292(b) on December 19, 1977.

Concluding that § 437h is available to any and all potential plaintiffs, the court of appeals remanded the case to the district court to: "(1) identify the constitutional and fact issues raised by the complaint; (2) take whatever evidence the court finds necessary to a decision of those issues; (3) make findings of fact; and (4) certify the assembled record and the constitutional questions arising therefrom to this court for decision pursuant to § 437h." 591 F.2d at 36. Rejecting the Commission's opposition to certification, the district court on December 19, 1979

certified four constitutional questions to the *en banc* court of appeals, J.A. at 106-107, along with extensive findings of fact, J.A. at 48-105.[6]

On December 5, 1980, the *en banc* court of appeals rendered its decision. The court declined to overrule an earlier panel decision upholding the eligibility of

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[6] The court rejected the constitutional questions for certification proposed by plaintiff, Appellant's Brief ("App. Br.") at II, and certified the following questions to the court *en banc*:

> 1. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, infringes plaintiffs' right of assembly as guaranteed by the First Amendment to the Constitution of the United States of America;
>
> 2. Whether 2 U.S.C. § 441b(b)(4)(D), both facially and as applied, deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment of the Constitution of the United States;
>
> 3. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term "solicitation" infringes plaintiffs' right of assembly guaranteed by the First Amendment to the Constitution of the United States, or deprives plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States;
>
> 4. Whether the failure of the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, to define the term "trade association," as used in 2 U.S.C. § 441b(b)(4)(D), violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Appellants have not appealed to this Court the *en banc* court's decision that the absence of a statutory definition of the term "trade association" did not violate the due process clause of the fifth amendment. The court found that the term 'trade association' like 'solicitation' is a frequently used and well understood term, and that the plain and ordinary meaning of the term together with the Commission's adherence to that meaning reflected in Commission regulations, warranted this conclusion.

appellants to invoke § 437h; FECA's extraordinary jurisdictional provision.[7]

The court upheld the constitutionality of 2 U.S.C. § 441b(b)(4)(D), answering all questions certified in the negative. The court found that § 441b(b)(4)(D) "is a very narrowly drawn aspect of a statutory scheme carefully designed [by Congress] to balance a compelling governmental interest and jealously guarded First Amendment freedoms." J.S. App. at 15. The court concluded that "section 441b(b)(4)(D) serve[s] to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections." Further, the court observed that "the restrictions in issue here apply only where a trade association employs corporate funds" to cover the cost of solicitation and that the restrictions "serve to prevent the [§ 441b(b)(4)(D)] exception from swallowing the whole" general prohibition on corporate spending in connection with federal elections. J.S. App. at 14.

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[7] Eligible plaintiffs granted standing under § 437h are "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President." 2 U.S.C. § 437h, FEC App. at 1a.

SUMMARY OF ARGUMENT

I.

This case presents the threshold issue of whether parties not among the categories explicitly enumerated by Congress as eligible plaintiffs in 2 U.S.C. § 437h may invoke the appellate jurisdiction of this Court pursuant to that provision. Congress limited the use of the extraordinary procedures in § 437h to those parties which it determined to be appropriate to represent the public interest in assuring the constitutionality of the Act: "the Commission, the national committee of a political party, or any individual eligible to vote in any election for the office of President." Appellants herein are not national committees or voters, but political committees of incorporated entities which are themselves composed of corporate members. Rather than representing the public interest, they represent only their private interest in increasing their own political influence by invalidating the Act's regulation of their solicitation activities. Thus, they are not entitled to utilize § 437h as a jurisdictional base for review by this Court, but can raise their constitutional objections to the Act only at such time as the Commission seeks to enforce the Act against them. *See* 2 U.S.C. § 437g(a)(6).

Congress's express limitation on § 437h's grant of federal jurisdiction should be respected, not disregarded so as to authorize suits raising constitutional issues by any party affected by the Act. Since appellants are not eligible to invoke the appellate jurisdiction of this Court pursuant to § 437h, the Court should dismiss this case for lack of jurisdiction.

II.

Should this Court decide that it has jurisdiction, it should affirm the decision below, for 2 U.S.C. § 441b

(b)(4)(D) violates neither the first amendment nor the fifth amendment to the Constitution of the United States.

A. In essence, § 441b(b)(4)(D) is a permissive provision, which allows incorporated trade associations to utilize corporate funds to solicit political contributions from certain individuals who are not members of the trade association, but are employed by, or own stock in, corporations which are members of the trade association. In order to ensure that this permission cannot be used to circumvent the statute's general limitation on political spending by corporations through multiple trade associations serving the interests of the same overlapping corporate membership, Congress designed the statute to allow corporations to permit only one trade association per year to solicit contributions from its personnel.

Section 441b(b)(4)(D) does not affect individual freedom of speech or association at all—individuals are free to engage in a wide variety of political activities and, in particular, may join trade associations or contribute to trade association political committees if they so desire. This provision also does not interfere with political expression by trade association political committees. Rather, it only limits the ability of an incorporated trade association to utilize corporate money to solicit contributions to its separate segregated political fund, from certain individuals who have not chosen to associate with the trade association by becoming members. Section 441b(b)(4)(D) does not involve anything remotely resembling censorship, and the requirement that a trade association obtain its member corporation's consent before soliciting the corporation's employees and stockholders does not constitute the sort of prior restraint on speech which has been found to exist when

a government official exercises discretionary power to regulate expression by groups of individuals. Moreover, since this safeguard is narrowly drawn to ensure that this permissive provision cannot be utilized to circumvent the statute's other prohibitions, it serves a compelling governmental interest. *See California Medical Association* v. *Federal Election Commission*, —— U.S. ——, 101 S.Ct. 2712, 2724 (June 26, 1981).

B. Statutes which contain reasonable classifications do not violate the due process clause of the fifth amendment, and this Court has already determined that the differing treatments of different entities under this statute reasonably "reflect a judgment by Congress that these entities have differing structures and purposes that require different forms of regulation in order to protect the integrity of the electoral process." *CMA* v. *FEC*, 101 S.Ct. at 2724. Moreover, any difference in treatment under § 441b(b)(4)(D) favors, rather than disadvantages, trade associations, for that provision extends to trade associations an additional solicitation authority not enjoyed by other corporations. Since the basic classification in the statute is rationally based, it does not violate the fifth amendment, even if corporate trade associations find themselves unable to raise as much money in their political funds as they would like because of independent circumstances.

C. The term "solicit" is no more unconstitutionally vague in § 441b(b)(4)(D) than it is in any of the other statutes in which it has been upheld against vagueness challenges. Moreover, any problem in this regard is mitigated by the Act's advisory opinion procedure, which provides an opportunity for parties to obtain, in advance, a binding ruling by the Commission on the lawfulness of any proposed activity.

ARGUMENT

I. APPELLANTS, CORPORATIONS AND THEIR SEPARATE SEGREGATED FUNDS, ARE NOT ELIGIBLE PLAINTIFFS AS DEFINED BY CONGRESS IN 2 U.S.C. § 437h AND, ACCORDINGLY, HAVE NO RIGHT TO INVOKE THE JURISDICTION OF THIS COURT PURSUANT TO THAT PROVISION.

Section 437h provides that "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President" may file an action appropriate to construe the constitutionality of any provision of the Act. Appellants admit that they are not among the categories enumerated by Congress as eligible plaintiffs in § 437h. Indeed, far from being individuals eligible to vote, appellants are political committees of incorporated entities which are themselves composed of corporate members.[8] Thus, they are not entitled to utilize § 437h as a jurisdictional base for review by this Court.

Congress has explicated in precise terms whom it felt appropriately should be entrusted with the power to bring suit under § 437h to define and vindicate the public rights established by FECA. Clearly, in thus legislating the public rights embodied in FECA, Congress has broad latitude to determine the appropriate parties and statutory procedures to enforce those rights. *Cort* v. *Ash*, 422 U.S. 66 (1975).[9] Congress

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[8] As the court below noted, "separate segregated funds are simply the political arms of the parent organization." J.S. App. at 3. *Accord, Pipefitters*, 407 U.S. at 426.

[9] This Court has already concluded that Congress did not create a private right of action for enforcement of FECA. *Cort* v. *Ash*, 422 U.S. at 77-78.

has expressly limited the use of § 437h to those parties which it reasonably determined to best represent the public interest in assuring the constitutionality of the Act. The Commission is the independent agency established by Congress to administer and enforce the Act, 2 U.S.C. § 437c(b); *Buckley*, 424 U.S. at 109-113; the national committees of the political parties play a central role in the political process, *Democratic Party of the United States* v. *LaFollette*, —— U.S. ——, 101 S. Ct. 1010, 1024 (Feb. 25, 1981) (Powell, J., dissenting); *Branti* v. *Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting); and the voters are the class for whose ultimate benefit the entire scheme of the Act, intended to ensure the integrity of the electoral system, was designed.

In contrast, corporations and their political committees, like the appellants here, do not represent the public interest, but only their own interest in maximizing their political influence. Congress has not provided them with an expedited review procedure, such as that embodied in § 437h, to assert this private interest. Rather, Congress has provided such parties, in § 437g, with an opportunity to raise their constitutional objections to the Act's restrictions on their political activities at such time as the Commission seeks to enforce those restrictions against them.[10] This procedure for obtaining judicial consideration of appellants' constitutional objections cannot be said to unduly infringe any of their rights, for it is the only procedure available for raising such constitu-

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[10] Under 2 U.S.C. § 437g(a)(6), all persons subject to Commission enforcement actions have the opportunity for *de novo* review in federal district court.

tional objections under most administrative statutes. *See, e.g., DuBois Clubs* v. *Clark*, 389 U.S. 309, 311-312 (1967); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); *Grutka* v. *Barbour*, 549 F.2d 5, 9-10 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977).

The legislative history confirms that Congress intended § 437h to be read as written—to embody a limited provision for judicial review of those constitutional challenges to the Act raised by the enumerated parties representing the public interest.[11] As this Court recognized in *California Medical Association* v. *Federal Election Commission*, —— U.S. ——, 101 S. Ct. 2712, 2717 (June 26, 1981) (*"CMA* v. *FEC"*), the congressional debates indicate that this unique expeditious review provision was offered only to provide prompt judicial review of certain new provisions of the 1974 Amendments which Senator Buckley considered unconstitutional.[12] The House of

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[11] The affidavits of former Senator James Buckley and Mr. David Keene offered by appellants in an attempt to create retroactive legislative history are of no probative value. "Such statements 'represent only the personal views of these legislators since the statements were [made] after passage of the Act'." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) *quoting National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). *See also Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978) (*"post hoc* observations by a single member of Congress carry little if any weight").

[12] In 26 U.S.C. § 9011(b) Congress adopted a similar narrow grant of standing to "the Commission, the national committee of any political party and individuals eligible to vote for President" to institute actions appropriate to implement or construe the Presidential Election Campaign Fund Act, ("Fund Act"), 26 U.S.C. §§ 9001-9013. Congress sought by the enactment of § 9011(b) to extend federal court jurisdiction to hear and decide, on an expedited basis, questions of the proper construction of the Fund Act so that

Representatives was particularly concerned that § 437h not be read to encourage a multiplicity of suits which could strain the resources of the federal courts due to the *en banc* requirement. Mark-up—Federal Election Campaign Act Amendments of 1974, Committee on House Administration, 93d Cong., 2d Sess. at 705 (1974). *See also CMA* v. *FEC*, 101 S.Ct. at 2725-2728 (Stewart, J., dissenting). And, as previously noted, Congress explicitly assured that private parties had ample opportunity to protect themselves against constitutional injuries alleged to result from the enforcement of the statute against them.[13]

Congress possesses plenary authority to determine the limits of its jurisdictional statutes,[14] and they should be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U.S. 206, 212 (1968). Moreover, a narrow construction of statutes authorizing direct appeals to this Court, such as § 437h, has been

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public financing for presidential or vice presidential candidates would not interfere with the normal operation of political campaigns. S. Conf. Rep. No. 92-553, 92d Cong., 1st Sess., 53-54 (1971); 117 Cong. Rec. 45,855, 45,857 (1971). Similar considerations regarding interruption of the enforcement and administration of FECA may have influenced Congress's designation of the same classes of eligible plaintiffs in § 437h.

[13] The language employed in § 437h is in direct contrast to other provisions of the Act authorizing broader access to judicial review. For example, 2 U.S.C. § 437g(a)(8) provides for limited judicial review of the Commission's dismissal of an administrative complaint or failure to act on a complaint within 120 days in suits by "any party aggrieved."

[14] *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 372 (1978); *Palmore* v. *United States*, 411 U.S. 389, 400-401 (1972); *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943).

found to be particularly appropriate. *See, e.g., Key* v. *Doyle*, 434 U.S. 59, 66 (1977); *Palmore* v. *United States*, 411 U.S. at 396; *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). Accordingly, several courts have construed § 437h's grant of federal jurisdiction narrowly. *See, e.g., Martin Tractor* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (D.D.C. 1978), *aff'd*, 627 F.2d 375 (1980), *cert. denied, sub nom. National Chamber Alliance for Politics* v. *Federal Election Commission*, 449 U.S. 954 (1980); *Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978); *Buckley* v. *Valeo*, 387 F. Supp. 135, 142 n.14 (D.D.C. 1975).

The decisions of this Court in *Buckley, supra*, and *CMA* v. *FEC, supra*, are not to the contrary. While both concluded that the courts' jurisdiction in suits properly brought under § 437h was to be construed as broadly as permitted by Article III, neither of those cases remotely suggested that parties who are not among those designated by Congress are eligible to invoke this Court's jurisdiction under § 437h.[15] In fact, although neither of those decisions addressed the specific issue raised in the instant action,[16] in each case the Court specifically noted that at least the individual plaintiffs before it fell within § 437h's categories of permissible plaintiffs.

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[15] Particularly where the jurisdiction conferred is so broad, "a clearer indication of congressional intent . . . is required to extend this Court's mandatory appellate jurisdiction." *Key* v. *Doyle*, 434 U.S. at 66 n.12. *See also Muskrat* v. *United States*, 219 U.S. 246 (1911).

[16] In *CMA* v. *FEC*, 101 S.Ct. at 2717 n.6, the Court expressly declined to decide whether parties not enumerated in § 437h's grant of standing may nonetheless raise constitutional claims pursuant to that section.

CMA v. *FEC*, 101 S.Ct. at 2717 n.6; *Buckley*, 424 U.S. at 11-12. In the present case, none of the appellants are within those categories, and none are individuals. Rather, they are separate segregated funds and incorporated trade associations composed of corporate members.

In sum, a limited construction of FECA's extraordinary judicial review provision, 2 U.S.C. § 437h, is supported by the statute's express language, the traditional concepts of statutory construction, and the legislative history, and is consistent with the prior decisions of this Court. Because appellants are not eligible to invoke the appellate jurisdiction of this Court pursuant to § 437h, this Court should dismiss this case for lack of jurisdiction.

II. SECTION 441b(b)(4)(D) OF FECA DOES NOT VIOLATE EITHER THE FIRST OR THE FIFTH AMENDMENT.

The legislative history of § 441b demonstrates that Congress has long considered large-scale election activity by corporations and labor organizations to present special dangers for the integrity of the election process. Congress determined first that corporations', and later that labor organizations', aggregations of wealth presented such disruptive power and influence in connection with federal elections that prohibition of contributions and expenditures by these entities was necessary. *See Pipefitters*, *supra*; *U.S.* v. *CIO*, *supra*; *U.S.* v. *UAW*, *supra*.

The § 441b statutory scheme is the result of Congress's continuing reassessment of the delicate balance between the important governmental interests served by the prohibition and the special interests of those persons who make up the corporation or who are members of the labor organization. Thus, as a

result of continuing deliberation over the entire § 441b scheme, Congress incorporated the balance into the statute by continuing the general prohibition on the use of corporation funds and excepting from it certain types of expenditures, including the use of corporate or union money to establish, administer and solicit contributions to separate segregated funds, where such expenditures were warranted because of the strong interest in permitting sponsorship of political activity for those "closely affiliated" with the corporation or union. *CMA* v. *FEC*, 641 F.2d 619, 630 (9th Cir. 1980) (en banc) *aff'd* —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981).

Section 441b(b)(4)(A) permits corporate trade associations, like other corporations, to use corporate funds to establish and support their own separate segregated funds in addition to those established by their corporate members, and to use general treasury funds to solicit contributions to such funds from their own stockholders and executive and administrative personnel. Congress has also enacted two additional exceptions to § 441b that apply to trade associations: § 441b(b)(4)(C) permits a corporate trade association to use corporate monies to solicit contributions to its fund from its individual members, and § 441b(b)(4)(D) permits them to solicit contributions from the stockholders and executive and administrative personnel of consenting member corporations.[17] Concerned over the impact of the latter exception on the individual stockholder and employee,

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[17] Senator Cannon, the floor leader and primary sponsor of the 1976 amendments in the Senate, explained the purpose of these additional sources of solicitees for trade associations as follows:

> The Conference bill adopted the House provisions *giving trade associations rights to solicit stockholders and execu-*

and concerned that the new § 441b(b)(4)(D) not become a means by which corporations could circumvent the § 441b prohibition through a proliferation of trade associations, each with its own separate segregated fund, Congress incorporated safeguards into the provision, which allow a corporation to give permission only to one trade association each year to solicit its stockholders and executive and administrative personnel.

In this case, appellants do not challenge the constitutionality of § 441b(a), the general prohibition against direct and indirect corporate and union contributions and expenditures in connection with federal elections; nor do they challenge the limitations in § 441b(b)(4)(A) upon the categories of individuals which may be solicited with corporate money for contributions to a separate segregated political fund. Rather, appellants challenge only § 441b(b)(4)(D), the function of which is to permit incorporated trade associations to use corporate funds to solicit an additional pool of individuals—the stockholders, executive and administrative personnel of its consenting member corporations. Appellants contend that the safeguards built into this permissive provision somehow violate their first and fifth amendment rights, and ask this Court to broaden the § 441b(b)(4)(D)

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tive or administrative personnel of a member corporation. . . .

[The provision] applies only to trade associations with corporate members and is intended to regulate solicitation of the stockholders and executive or administrative personnel of such corporate members. A trade association which is a membership organization may, of course, solicit its other members, such as individuals, partnerships, et cetera, under section 321(b)(4)(C).

122 Cong. Rec. S6365 (daily ed. May 3, 1976) (remarks of Sen. Cannon) (emphasis added), *1976 Legis. Hist.* at 1091.

exception to § 441b(a) even further than permitted by Congress, to allow incorporated trade associations to use their corporate funds to solicit contributions to their separate segregated funds from anyone having an "affinity of interest."[18] App. Br. at 36. As we demonstrate below, not only are appellants' constitutional arguments incorrect, but the entire premise of their case misconstrues the operation of the statute. For as the court of appeals observed, invalidating § 441b(b)(4)(D) would "make any solicitation [by a trade association] of its corporate member's shareholders and administrative/executive personnel unlawful because such solicitations are prohibited under Section 441b(b)(4)(A) except as provided in Section 441b(b)(4)(D)." J.S. App. at 14.

A. 2 U.S.C. § 441b(b)(4)(D) is consistent with the right of assembly guaranteed by the first amendment.

The right of association, which springs from the first amendment rights of speech and assembly, grants to individuals the right to join together to address and inform the government and others on issues of vital concern. *See Thomas* v. *Collins*, 323 U.S. 516 (1945); *Hague* v. *CIO*, 307 U.S. 496 (1939); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). However, nothing in § 441b in any way affects the ability of anyone to assemble to petition the government for redress of grievances. To the contrary, trade associations are completely free to solicit anyone to become a member of the trade association, and thus to participate in any activities the membership of the trade association chooses to undertake, including political discussions, lobbying activities,

[18] Congress specifically rejected the "affinity of interest" standard advocated by appellants here. 122 Cong. Rec. S3518 (daily ed. March 16, 1976) (remarks of Sen. Cannon). *See* note 31, *infra*.

and being solicited to contribute to the trade association's separate segregated fund.[19] Moreover, the individuals who manage the trade association are free to set up a political committee which is not maintained by corporate funds, and to solicit anyone for contributions. The only instance in which section 441b comes into play at all, is when the incorporated trade association chooses to utilize corporate money in connection with federal elections. It is solely the use of corporate money, and not the freedom of individuals to associate for any purpose, which is limited by Section 441b. Moreover, even in this narrow area, the only way in which any individuals are affected by § 441(b)(b)(4)(D) is that they will not be solicited for contributions to a political fund controlled and operated by a trade association with which the individual has not chosen as associate by becoming a member. Moreover, as this Court has held twice before, political contributions are "not the sort of political advocacy . . . entitled to full First Amendment protection." *CMA* v. *FEC*, 101 S.Ct. at 2722.

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate *involves speech by someone other than the contributors.*

CMA v. *FEC*, 101 S.Ct. at 2722 (emphasis in original), *quoting Buckley*, 424 U.S. at 21.

In any event, these rights are not absolute. *Buckley*, 424 U.S. at 25; *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 567 (1973). *See also United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Where a "sufficiently important" governmental interest can be shown, regulation

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[19] *See* Findings of Fact 4, 5, 6, 47, 48, 177-180, J.A. at 49, 60, 73, 95-96.

of such activities is permissible. *Buckley*, 424 U.S. at 25. *See also Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) ("[s]oliciting financial support is undoubtedly subject to reasonable regulation . . ."; *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 50-51 (1961). Even if this Court concludes that § 441b(b)(4)(D) results in in some infringement of individual rights, the interests served by this statute are sufficiently important to justify such minimal intrusion on individuals' first amendment rights.

The § 441b prohibition on contributions and expenditures by corporations and labor organizations is part of a comprehensive and well balanced system chosen by Congress to regulate the influence and use of corporate funds in federal elections and at the same time protect the interests of those persons closely connected with the corporation or union.[20] The legislative history of § 441b indicates that election law reform was enacted in response to public sentiment aroused by rumors of large campaign coffers being amassed and used by corporations and labor unions to influence elections. *U.S.* v. *UAW*, 352 U.S. at 579. As this Court noted in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26, *reh. denied*, 438 U.S. 907 (1978), "[t]he overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act [2 U.S.C. § 441b(b)] was the problem of corruption of elected representatives

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[20] This Court has recognized Congress's power to regulate federal elections and evaluate the need for remedial legislation to protect the integrity of the federal electoral process. *See* United States Constitution, art. I, § 4; *Buckley*, 424 U.S. at 13 n.16, 18, 19; *Ex parte Siebold*, 100 U.S. 371, 383 (1879). *See also Pipefitters, supra; U.S.* v. *UAW, supra; U.S.* v. *CIO, supra.*

through the creation of political debts . . . . The importance of the governmental interest in preventing this occurrence has never been doubted." *Citing U.S.* v. *UAW*, 352 U.S. at 570-575; *Schwartz* v. *Romnes*, 495 F.2d 844, 849-851 (2d Cir. 1974). Thus, as the court of appeals here concluded:

> [t]he transcendant legislative objective served by the Federal Election Campaign Act is the elimination of corruption and the appearance of corruption in the federal election process. The restriction imposed by section 441b of the Act on labor organizations and corporations, including incorporated trade associations are designed to serve both this objective and the additional objective of protecting individuals from economic coercion. *U.S.* v. *UAW*, 352 U.S. 567, 570-84; *U.S.* v. *CIO*, 355 U.S. 106, 113.

J.S. App. at 10. For these reasons, federal courts have consistenly declined to hold § 441b and its predecessor, 18 U.S.C. § 610, unconstitutional. *See Pipefitters, supra; U.S.* v. *UAW, supra; U.S.* v. *CIO, supra; CMA* v. *FEC, supra; Federal Election Commission* v. *Lance*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, —— U.S. ——, 101 S.Ct. 3151 (July 2, 1981).[21] Because of the importance of this statutory prohibition, Congress has narrowly limited

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[21] Indeed, every lower federal court which has been presented with the question has expressly found § 441b to be constitutional. *See United States* v. *Chestnut*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local Union No. 562*, 434 F.2d 1116 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, *rev'd on other grounds*, 407 U.S. 385 (1972); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1072 (E.D.N.Y. 1976); *United States* v. *Brewers' Association*, 239 F. 163 (W.D. Pa. 1916).

the use of corporate and union treasury funds in federal elections to those instances in which the interests of "closely affiliated" individuals in having their political activity sponsored by their corporation or union is particularly strong. *CMA* v. *FEC*, 641 F.2d at 630.

The restrictions on solicitation in § 441b(b)(4)(D) clearly serve compelling governmental interests. While reassessing the equities involved in drafting the exceptions to § 441b in 1976, Congress became concerned that proliferation of separate segregated funds of corporations and labor organizations could be used to circumvent FECA's contribution limitations. Congress dealt with the problem of directly affiliated political committees in § 441a(a)(5), which provides that all political committees set up by a single corporate entity, labor organization or any person are considered to be a single committee with a single contribution limitation. *See* H.R. Rep. No. 94-1057, 94th Cong., 2d Sess., at 58 (1976). In balancing the aims of the statute, Congress accommodated the special interests of the trade associations and permitted, without triggering § 441a(a)(5), some cross-solicitation under § 441b(b)(4)(D). However, the limitation in § 441b(b)(4)(D) on the number of trade associations which a corporation may permit to solicit its personnel serves a purpose similar to that of §441a(a)(5) with respect to separate segregated political funds set up by trade associations for the benefit of their corporate members.

The record shows that in many instances business corporations belong to numerous trade associations which advocate the views of, and provide services for, the various business concerns which the member corporations have. Finding 9, J.A. at 50. In addition,

a substantial number of the federated members [22] belong to one or more trade associations. Findings 26, 56, J.A. at 55, 63. Thus, there exists an enormous amount of overlapping of membership. Further, a corporate member of a trade association may contribute funds to its trade association to be used to defray the operational, administrative and solicitation expenses of the trade association's separate segregated fund. AO 1980-59, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5515. Without the provision in § 441b(b)(4)(D) limiting the number of trade associations that can solicit political contributions from stockholders and administrative and executive personnel, business corporations would be able indirectly to establish, finance, maintain and control numerous separate segregated funds through trade associations and federations of trade associations, set up to serve their interests, and thus circumvent the § 441b prohibition.[23] As the court below found, since a corporation may become a member of many trade associations, "the restrictions in § 441b(b)(4)(D) serve to prevent a proliferation of trade associations and solicitations which would in turn undermine the very purpose of the Act's restrictions on the use of

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[22] For example, NLBMDA is a federation of 27 local, State and regional associations. Finding 24, J.A. at 54.

[23] This Court should defer to the limit chosen by Congress, which reflects Congress's judgment of what "best accommodates the competing interests involved." *Buckley*, 424 U.S. at 103; *Rostker* v. *Goldberg*, —— U.S. ——, 101 S.Ct. 2646, 2651 (June 25, 1981).

> [W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Buckley, 424 U.S. at 83 n. 111, *quoting Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

corporate treasuries in federal elections." J.S. App. at 14. Thus, "the restrictions placed on the potential pool of solicitees serve to prevent the exception from swallowing up the whole," J.S. App. at 19, which this Court has found in an analogous situation to be a compelling interest for regulating political contributions. *CMA* v. *FEC*, 101 S.Ct. at 2722-2723.

To be sure, to pass muster under the first amendment, regulations that affect individual freedom of expression must be precisely and narrowly drawn to further the interests identified and be the least restrictive means of protecting those governmental interests. *Buckley*, 424 U.S. at 65; *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-618 (1973). *But see*, *CMA* v. *FEC*, 101 S.Ct. at 2723 n.20. As the court below concluded, the provision at issue here is a "very narrowly drawn aspect of a statutory scheme carefully designed to balance a compelling governmental interest and jealously guarded First Amendment freedoms." J.S. App. at 15. *See also CMA* v. *FEC*, 641 F.2d at 631. Thus as discussed previously, FECA does not prohibit incorporated trade associations, like any other corporations, from disseminating information which is not connected with federal elections; nor does it prohibit trade associations from soliciting anyone to join the trade association, who may then be solicited with corporate money for political contributions. And it specifically permits incorporated trade associations, like all other corporations, to use corporate funds to: communicate freely with their members, stockholders and executive and administrative personnel and their families on any subject, § 441b(b)(2)(A); conduct non-partisan registration and get-out-the-vote campaigns aimed at their members, stockholders, and executive and administrative personnel and their families, § 441b(b)

(2)(B); establish, administer and solicit contributions to a separate segregated fund to be used for political purposes by the corporation, § 441b(b)(2)(C); solicit political contributions freely from their individual membership, § 441b(b)(4)(C); and solicit political contributions from their own employees twice yearly under certain circumstances. And section 441b(b)(4)(D), at issue here, permits incorporated trade associations to use corporate monies to solicit political contributions from the stockholders, and executive and administrative employees, and their families, of consenting corporate members. Thus, FECA, including § 441b(b)(4)(D), clearly does not limit trade associations to soliciting contributions only from the stockholders and executive and administrative employees of their member corporations, as appellants suggest, and it does not restrict issue discussion in any way. *See also* 11 C.F.R. § 114. Indeed, the record in this case indicates that trade associations do engage in a myriad of first amendment activities without any restraint or interference by FECA.[24] In sum, as the court of appeals concluded,

> [n]othing in § 441b(b)(4)(D) limits the expression or dissemination of political ideas and information either to individuals described in the section or to any other individual. Indeed there has been no showing that this provision has had or could have any prior restraining effect whatsoever on the free flow of political information and opinion by trade associations or their political committees. Nor does § 441b(b)(4)(D) prohibit trade associations from joining the shareholders and executive or administrative employees of its member corporations to it in

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[24] *See* Findings 4, 5, 6, 36, 37, 41, 42, 44, 90, 92, J.A. at 49, 58-59, 60, 72, 73, for types of activities engaged in by appellants.

common cause. They are free to solicit any individual to join their trade association.

J.S. App. at 12-13.[25]

Appellants contend, however, that a "fundamental right of the potential contributor to . . . engage in political association through the pooling of political contributions" is abridged by § 441b(b)(4)(D), because their separate segregated funds would serve to "amplify" the political voices of the individual employees of their member corporations, if those employees could be solicited. App. Br. at 21. However, as this Court has recognized, a separate segregated fund established and maintained by a corporation is but an extension of the corporation, the only separation being a separate account. *Pipefitters*, 407 U.S. at 413-17, 421, 429. And, as the record in this case shows, the trade associations' purpose for existence is to serve their corporate members' commercial interests.[26] Clearly then, the only voice "amplified" by the trade association's separate segregated fund is that of the trade association, speaking for the business interests of its corporate members, and not the voices of individuals who are employed by the corporate members. *See* Findings 4, 5, J.A. at 49; Findings 40-45, J.A. at 60; Finding 49, J.A. at 61; Findings 67-69, J.A. at 65-67; Findings 91, 92, J.A. at 73-74.

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[25] The court of appeals noted that Judge Marshall's uncontested findings of fact set forth in the record clearly establish that "plaintiffs are engaged on a daily basis," and are "unimpeded" by § 441b(b)(4)(D), in a "broad range of first amendment activities." J.S. App. at 13.

[26] The record in this case demonstrates that to serve this end trade associations "undertake such activities as government relations, lobbying on specific legislation, education, information dissemination advertising" and "meeting with regulators and legislators to present the industries' view point." Findings 4, 6, J.A. at 49.

Moreover, nothing in § 441b purports to limit the activities of individuals at all—it is solely a limitation upon the use of corporate and union funds in connection with federal elections. Any individual may associate with appellants by joining their associations, and may then engage freely in all aspects of appellants' activities, including being solicited to contribute to their separate segregated funds.[27] Section 441b affects only the *corporations'* ability to use corporate funds to solicit political contributions from certain individuals who have *not* chosen to become members of the associations. For these reasons, appellants' attempt to wrap their corporate interests in the mantle of individual freedoms is unavailing.

Finally, appellants contend that by limiting them to using corporate funds to solicit contributions from stockholders and executive and administrative personnel only from consenting member corporations, § 441b(b)(4)(D) operates as a prior restraint on their freedoms of speech and association. Since appellants did not request that the prior restraint issue be certified to the court of appeals *en banc*, and the issue was not certified under § 437h, J.S. App. at 30, n.2, the Commission believes that this Court need not reach this question. However, the *en banc* court of appeals did consider it, and correctly dismissed the prior restraint argument as "tenuous." J.S. App. at

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[27] In addition, the individual remains free: to make unlimited direct expenditures to influence federal elections; to volunteer his or her personal services on behalf of any candidate or committee; to use real or personal property and provide invitations, food and beverages up to $1,000 in an election; to contribute up to $1,000 per election to any federal candidate and up to $5,000 to any political committee. The individual employee may also be solicited for contributions and contribute to the separate segregated fund set up by the corporation which employs the individual. *See also* 2 U.S.C. § 441a(d)(2).

14. For FECA does not provide for any form of prior censorship of first amendment activity.[28] Indeed, although in some circumstances regulation of speech by government officials has been found to be an unconstitutional "prior restraint" on speech,[29] this Court has never held a private corporation's refusal to permit outsiders to solicit its employees to be an unconstitutional prior restraint.[30] Thus, it would appear that appellants' prior restraint argument is nothing more than a restatement, under another label, of their argument that they have a constitutional right to use corporate funds to freely solicit political contributions from the employees and stockholders of their member corporations, an argument we have already shown to be erroneous.

Appellants argue that § 441b(b)(4)(D) has given their corporate members "unbridled power" to determine whether to allow solicitations of their employees and stockholders by the trade associations to which they belong. However, even under appellant's theory,

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[28] This Court has recognized that a distinction exists between regulation and censorship. *See Poulus* v. *New Hampshire*, 345 U.S. 395, 408 (1953), *citing Near* v. *Minnesota*, 283 U.S. 697, 712 (1931). *See also, Konigsberg* v. *State Bar of California*, 366 U.S. at 50 (regulation not designed to control content permissible when supported by sufficient governmental interest).

[29] *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975).

[30] As this Court explained in *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976):

> [W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

corporations could exercise the same power simply by not joining a trade association. Thus, the provision in § 441b(b)(4)(D) which appellants call a "prior restraint" merely enables corporations to join a trade association without being legally required to expose their employees to additional political solicitation by the trade association. Appellants would have the law require that one of the conditions of joining a trade association must be the granting of solicitation rights by the corporate entity. Appellants thus demand the "unbridled" right to go behind their direct relationship with their corporate members, and solicit contributions to their own political committees from individuals whose only connection with the trade association is that they happen to work for, or own stock in, a corporation which may have joined the trade association for entirely nonpolitical reasons. Whatever might be said for this argument on policy grounds, Congress clearly had compelling reasons for rejecting it,[31] and building safeguards against prolif-

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[31] To support the "affinity of interest" standard for solicitation which appellants propose—a standard specifically rejected by Congress, 122 Cong. Rec. S3518 (daily ed. Mar. 16, 1976) (remarks of Sen. Cannon)—appellants cite to a letter written by Richard Thornburgh. App. Br. at 36. This Court has recognized the unpersuasiveness and questionable reliability of such observations as to congressional intent when compared with articulated purposes to the contrary as set forth in the legislative history. In *Pipefitters*, 407 U.S. at 425 n.39, this Court quoted Representative Hays' observation:

> I will say to the gentleman that what he is saying will be the legitimate legislative history and that . . . some Assistant Attorney General's opinion [referring to Mr. Thornburgh] . . . is worth as much as the piece of paper it is printed on, no more and no less. 118 Cong. Rec. 328 (remarks of Rep. Hays).

See also State of Minnesota v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. 715 (Jan. 21, 1981).

eration into this permissive provision.[32] As the court of appeals concluded:

> "[t]o the extent that the corporate approval requirement has a 'prior restraining' effect on the solicitations only allowed by virtue of Section 441b(b)(4)(D) itself, we think it both tenuous and amply justified by the necessity of providing a mechanism to prevent the exception from swallowing the whole."

J.S. App. at 14.

In sum, it is clear that appellants are only concerned here with their inability to use corporate treasury funds to "freely solicit contributions from shareholders and employees of their member corporations for use by their own political committee[s]." J.S. App. at 14. Indeed, as the court below recognized,

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[32] This Court has stated that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *State of Minnesota* v. *Clover Leaf Creamery Co.*, —— U.S. ——, 101 S.Ct. at 726 *citing Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). *See also Buckley*, 424 U.S. at 260. (White, J., concurring in part and dissenting in part). Even in the first amendment area, this Court has declared that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment . . . casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973). *See also Fullilove* v. *Klutznik*, 448 U.S. 448 (1980). Rather, when faced with "a complex problem with many hard questions and few easy answers," the Court does "well to pay careful attention to how the other branches of Government have addressed the same problem," and how Congress has examined legislative developments. *Id.* It is the Congress which has the resources and the power to inform itself and is the appropriate forum where the conflicting pros and cons are presented and considered. *United States* v. *Robel*, 389 U.S. 258, 276 (1967). *See also Rostker* v. *Goldberg*, —— U.S. ——, 101 S.Ct. at 2651.

the same individuals who organized these committees are free to organize a political committee "independent of, rather than merely segregated from, the corporate treasury and corporate funds and thereby be free to solicit 'the world.'" J.S. App. at 19. However, once a voluntary decision is made to take advantage of the Act's provision allowing unlimited use of corporate treasury funds to establish, support, and solicit contributions to a separate segregated fund, incorporated trade associations are bound by the limitations of § 441b like all other corporations and unions. Since the record demonstrates that the restriction on solicitation does not impinge on appellants' ability to freely discuss issues and is applicable only where the trade association employs corporate funds to conduct its solicitations, the court below properly concluded that "Section 441b(b)(4)(D) does not impermissibly infringe upon plaintiff's right of assembly." J.S. App. at 16.

B. 2 U.S.C. § 441b(b)(4)(D) is consistent with the due process clause of the Fifth Amendment.

Though the fifth amendment has no equal protection clause, "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). Thus "equal protection analysis in the fifth amendment area is the same as that under the fourteenth amendment . . .", *Buckley*, 424 U.S. at 93. This Court has also recognized that classification itself does not deprive anyone of equal protection of the laws. *Carrington* v. *Rash*, 380 U.S. 89, 92 (1965), *relying on Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), *reh. denied*, 349 U.S. 925 (1955). *See State of Minnesota* v. *Clover Leaf Creamery Co.*, *supra*. Virtually all legislation involves some degree of classification, and this Court has consistently upheld federal statutes which estab-

lish reasonable classifications. *Buckley*, 424 U.S. at 93-108; *Schlesinger* v. *Ballard*, 419 U.S. 498, *reh. denied*, 420 U.S. 966 (1975); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 562-568 (1939).

This Court has previously affirmed the conclusion of another court that the provisions of § 441b limiting the activities of corporations and labor organizations are "even handed and entirely neutral on their face." *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 288 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d Cir. 1979) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1980). Thus, in order to establish that § 441b (b)(4)(D) "violates the equal protection component of the fifth amendment" appellants must demonstrate that this "provision of the Act burdens the First Amendment rights of [trade associations] to a greater extent than it burdens the same rights of [other] corporations and unions, and that such differential treatment is not justified." *CMA* v. *FEC*, 101 U.S. at 2724.

As in *CMA*, however, the Court need not consider the second question of "whether the discrimination alleged by appellants is justified" because there is no such discrimination against trade associations. *Id.* For as the court of appeals noted, appellants' argument that FECA through § 441b(b)(4)(D) "imposes far more restrictions on trade association PACs than other political committees," is a "misreading of the statute." J.S. App. at 17. Under the statute and Commission regulations, trade associations are permitted to exercise the same solicitation rights under 2 U.S.C. § 441b(b)(4)(A) and (B) as all other corporations, and in addition are permitted under § 441b(b)(4)(D) to solicit contributions to their

political funds from the executive and administrative employees of consenting corporate members. Further, as membership organizations or corporations without capital stock, trade associations can also solicit their individual and non-corporate members under 2 U.S.C. § 441b(b)(4)(C) and 11 C.F.R. § 114.8. Any disparity which exists favors rather than disadvantages incorporated trade associations. Thus, as in *CMA* v. *FEC*, 101 U.S. at 2724, "appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on [incorporated trade associations] than it does on [other] corporations or unions." [33]

Appellants argue that the Act violates the fifth amendment because trade associations are not treated precisely the same as other corporations and labor organizations. However, the concept of equal protection means that laws must apply alike "to all in the same situation." *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 412 (1910). Thus, as the court of appeals concluded, this argument "runs afoul of [appellants'] failure to demonstrate how trade as-

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[33] Since § 441b(b)(4)(D) was clearly intended to benefit trade associations, it can hardly be found to be the result of "purposeful discrimination" against trade associations, an essential element of an equal protection argument. *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980), *citing Washington* v. *Davis*, 426 U.S. 229 (1951); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). As this Court has explained:

> 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

sociations and labor organizations are 'similarly situated' parties." J.S. App. at 20. Indeed, Congress expressly recognized that trade associations, which represent corporate members, are different from organizations which are comprised of, or represent, individual members, *e.g.*, membership organizations, cooperatives and labor organizations. For those organizations Congress permitted solicitation of their individual members for contributions to their separate segregated funds; for the ordinary business corporation, it allowed solicitation of individuals closely affiliated with that corporation (*i.e.*, stockholders and executive and administrative personnel) for contributions to its separate segregated fund. However, Congress permitted trade associations to go beyond their immediate membership, and solicit contributions from individuals who have no connection with the trade association at all, but who are closely associated with its corporate member, whose consent the trade association must obtain before soliciting those individuals. Thus, as the court of appeals found, the relationship between a union and its own members "differs significantly" from the second hand relationship between a trade association and the stockholders and administrative and executive personnel of the separate corporations which are its members. J.S. App. at 19. As the court reasoned:

> Individuals join with other individuals in common cause as members of their union, and the union thus becomes their representative organization. A trade association is also a representative organization, *but it exists to promote the interests of its corporate and individual members, not the interests of the employees of its corporate members.*

Id. (emphasis added). Thus, the court below correctly concluded that the subsections to § 441b(b)(4)

were appropriately designed to address "differing groups [with] different structure[s] and a different kind of constituency . . . each [of which] requires somewhat different regulation to curb abuses the Act was intended to halt." J.S. App. at 18. Indeed, this Court has itself held that Congress's differing treatment of different entities in this statute properly "reflect[s] a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *CMA* v. *FEC*, 101 S.Ct. at 2724.

Appellants nevertheless argue that § 441b as a whole adversely affects their political fundraising because, they assert, unlike large for-profit corporations, incorporated trade associations have "no stockholders . . . small executive and administrative staffs and few . . . rank and file employees" to solicit. App. Br. at 44. Appellants ignore their freedom to recruit and solicit non-corporate members under § 441b(b)(4)(C), and protest the fact that they do not have individuals from whom they may solicit contributions under other § 441b exceptions, contending that this circumstance gives them a constitutional right to solicit contributions without regulation from all the stockholders, executive and administrative personnel of their corporate members. What this argument amounts to is the assertion that, while the statute is fair on its face, it affects appellants more harshly because of their independent circumstances, like a law against stealing bread affects a poor person more harshly than a rich person. App. Br. at 44. But this sort of disparate impact is insufficient to render this statute unconstitutional any more than a law against stealing bread is unconstitutional because of its disparate impact on the poor. *See, e.g., Ross* v. *Moffitt*, 417 U.S. 600, 611-612 (1974); *San Antonio Inde-*

pendent School District v. *Rodriguez*, 411 U.S. 1, 24 (1973). So long as "the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. at 272. In any event, through § 441b(b)(4)(D), Congress has acted to ameliorate the very complaint appellants raise by permitting them to solicit the individuals they seek to solicit, under reasonable safeguards to ensure that this cannot become a means to circumvent the statute's other limitations. *See discussion* at 24-26, *supra*.

C. 2 U.S.C. § 441b(b)(4)(D) is neither unconstitutionally vague nor overbroad.

It is well-established that the test for unconstitutional vagueness of a statutory phrase is whether people "of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926) *quoted in Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The term "solicit" as used in FECA falls far short of this standard. Indeed, as the court below noted, "statutes and rules using the term 'solicit' have been uniformly upheld" by this Court.[34]

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[34] *See Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412, 438 (1978); *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964). *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945); *See also Sargent* v. *Genesco*, 492 F.2d 750, 767 (5th Cir. 1974); *SEC* v. *May*, 229 F.2d 123 (2d Cir. 1956); *National Right to Work Committee, et al.* v. *Federal Election Commission*, 501 F. Supp. 422, 430-431 (D.D.C. 1980), *rev. on other grounds*, —— F.2d ——, Nos. 80-1487, 1488 (D.C.Cir. Sept. 4, 1981); *United States* v. *Guterma*, 189 F. Supp. 265 (S.D.N.Y. 1960).

J.S. App. at 20. Numerous federal statutes use the term "solicitation" without further definition, and this Court has not found it necessary to define the term "solicitation" nor required any further legislative definition to interpret the term when used in a statutory section. *Accord, Village of Schaumberg* v. *Citizens for a Better Environment*, 441 U.S. 620 (1980). Thus, the court of appeals properly concluded that failure to define the phrase "soliciting contributions" did not render § 441b(b)(4)(D) unconstitutionally vague.

Appellants nevertheless argue that the term "solicitation" is so inherently vague that its allows the FEC to become a "super-governmental censor" by disregarding the dictionary definition of solicitation. App. Br. at 49. Appellants base this argument primarily on *Martin Tractor* v. *FEC*, *supra*, and their mischaracterization of several advisory opinions issued by the Commission.

In *Martin Tractor* the court did note, as appellants suggest in their brief, that the "inherent vagueness of the term 'solicit' . . . might at first glance be thought to militate in favor of reaching the merits of appellants' claims regarding apparent chill of their first amendment rights caused by an overbroad statute." 627 F.2d at 384. However, the court refused to hold the provision or the statute unconstitutionally vague, finding that "the extent of the chill [on first amendment rights] induced by the statutory provision at issue [was] a very limited one." *Id.* The court in *Martin Tractor* recognized, as did the court of appeals in this case, that the advisory opinion mechanism in FECA "offers a prompt means of resolving doubts" as to the statute's reach and "mitigates whatever chill may be induced by the

statute." *Martin Tractor*, 627 F.2d at 384-5.[35] Indeed, the court below noted that appellants' confusion could have been, and still can be, easily clarified by the Commission if they would simply avail themselves of the advisory opinion process under § 437f.[36]

The Commission, vested by Congress with exclusive jurisdiction with regard to FECA, has the primary responsibility to determine when petitioned what is or is not permissible under the Act.[37] The Commission acts pursuant to this authority in issuing advisory opinions such as those discussed by appellants. Rather than utilizing FECA's advisory opinion procedure, however, appellants ask this Court to hold the statute unconstitutionally vague merely because of the unremarkable fact that the Commission has reached different results when presented with different sets of facts and circumstances.[38] *See*

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[35] In *Martin Tractor*, the court discussed the term *"solicit"* in connection with two other provisions of the same subsection of the Act at issue here, § 441b(b)(4)(A) and (B).

[36] Had appellants requested the Commission to issue an advisiory opinion on their specific situation, the Commission would have been required to make such a request public, to accept public comments and to issue the opinion within a statutory time restraint. Congress has ensured that persons to whom advisory opinions are issued and persons involved "in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which" an advisory opinion was rendered may rely on the opinion. 2 U.S.C. § 437f(c).

[37] *In re Carter-Mondale Reelection Committee, Inc.*, 624 F.2d 538 (D.C. Cir. 1980); *Federal Election Commission* v. *Americans for Change*, 429 F.Supp. 738 (D.D.C. 1980) (three-judge court), *appeal docketed*, No. 80-1067 (December 29, 1980).

[38] The advisory opinions discussed by appellants are not inconsistent, but illustrate that a determination of whether particular activity is a solicitation for contributions is a

NLRB v. *Dayton Tire & Rubber Co.*, 503 F.2d 759, 764 (1974); *NLRB* v. *Deaton, Inc.*, 502 F. 2d 1221, 1228 (5th Cir.), *cert. denied*, 422 U.S. 1047 (1975). However, as observed in the very decision upon which appellants rely, there is no reason why this Court should hold that "Congress may not delegate to the FEC—as it has to the NLRB—the task of deciding in the first instance what should be permitted and what

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factual matter. Indeed, if anything, the AO's cited by appellants demonstrate that the Commission's interpretation and application of the term solicitation is consistent with the common understanding of the term. *See* Stein, Jess. Ed., *The Random House Dictionary of the English Language*, the Unabridged Edition, Random House (N.Y. 1973). The Commission has found actions to be solicitations where they are designed to encourage nonsolicitable individuals to contribute to a trade association's separate political fund, and has found actions reasonably designed only to inform individuals of the existence of the political fund not to be solicitations. Thus, the Commission has determined that a trade association may invite members to a cocktail party to solicit contributions from their stockholders or executive or administrative personnel, with the prior approval of its member corporations, AO 1976-27, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5213; a trade association may operate a fundraising booth at the association's convention, if it takes steps to ensure that only permissible solicitees make contributions, AO 1978-17, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5307; and a trade association's separate segregated fund may operate a booth at the association's convention to seek authorizations from member corporations to solicit their executive employees, and to accept authorized contributions, AO 1978-83, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5382. On the other hand, the Commission has determined that it is a prohibited solicitation when a trade association includes in its newsletter, sent to a large number of nonsolicitable employees, an article which advocates the PAC activities and encourages employee participation in the PAC's success, AO 1979-13, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5403. *See also* AO 1976-96, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5227; AO 1981-41 (October 20, 1981).

forbidden" under FECA. *Martin Tractor*, 627 F. 2d at 387, *citing NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

CONCLUSION

This Court should dismiss this case as an improper appeal under § 437h. Should the Court determine that it has jurisdiction under § 437h, it should affirm the judgment of the court of appeals in full.

Respectfully submitted,

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